

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	No. CR 24-058-JCC
Plaintiff,	)	
v.	)	DEFENSE TRIAL BRIEF
JUSTIN BAKER	)	
Defendant.	)	

Justin Baker, through counsel Jesse Cantor and Colleen Fitzharris, submits this trial brief in preparation for trial currently scheduled for October 21, 2024.

**I. BACKGROUND**

Mr. Baker maintains his plea of not guilty to the single charge of Abusive Sexual Contact on an Aircraft. The defense is denial and as such does not require any further notice to the government, unlike affirmative defenses such as alibi, insanity, or public authority that must be presented with timely notice pursuant to Rules 12.1, 12.2, and 12.3. The denial defense requires the government to prove every element beyond a reasonable doubt without any further notice beyond Mr. Baker's plea of not guilty.

The defense agrees with the government's assessment that, if trial starts on schedule, it should conclude within the same week.

Mr. Baker is charged with having sexual contact with E.C. by allegedly touching her genitalia, breast, inner thigh, and buttocks without her consent. No one will dispute that sexual assault cases are sensitive and will evoke emotion. That is because many

people in our communities have experienced sexual assault either personally or know of others who have experienced sexual assault at various levels. For that reason, these cases present different challenges when it comes to selecting a fair and impartial jury compared with other crimes that do not affect others as commonly as sexual assault. Likely we will see, for example, a significant percentage of people in the jury pool indicating that they have been impacted by sexual assault. Unlike a federal money laundering case, or an immigration fraud case—cases that likely would not impact the pool as much on a personal level—a sexual assault case will require more voir dire time to better understand the biases of the prospective jurors. For these reasons, the defense recommends that this Court have the jury pool answer the joint proposed jury questionnaire filed at Dkt. 51.

## **II. EVIDENTIARY ISSUES AT TRIAL**

### **A. Federal Rule of Evidence 106**

The government points out in its trial brief that Mr. Baker is not entitled to offer his own hearsay statements, even in the event the government offers his prior statements. Dkt. 53 at 6. The government adds that the only exception would be if Mr. Baker can demonstrate that the government’s offering would lead to a “misunderstanding or distortion” thereby permitting Mr. Baker to introduce other statements to avert the misunderstanding. *Id.* However, in December of 2023, the evidence rules addressing this issue expanded as it relates to writings and/or recorded statements under Federal Rules of Evidence (FRE) 106. Specifically:

If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

FRE 106, *effective Dec 1, 2023.*

For these reasons, introducing additional statements from Mr. Baker, or any other statement for that matter, to ensure fairness is the new foundational standard this Court must follow. In other words, the standard is no longer a question of whether the government's offering would lead to a "misunderstanding or distortion." Furthermore, because the prior rule's language specified completion with "a writing or recorded statement," the practice at the time was to exclude oral statements from the application of the rule. Since the new rule's text eliminates this interpretation, the text of the new rule would now permit the introduction of oral statements in addition to written and recorded statements. Finally, the old version of the rule would not necessarily allow completion with hearsay statements. However, the amended rule, effective December 1, 2023, expressly permits completion with hearsay statements. For these reasons, the Court may consider any other statement made to ensure fairness in the event the government seeks to introduce portions of Mr. Baker's prior statements.

**B. Mr. Baker's Character**

The defense will not seek to introduce evidence of Mr. Baker's character.

**C. Excited Utterances**

The government has indicated that it may seek to elicit testimony about what the alleged victim said under the "excited utterance" exception to the hearsay rule. FRE 803(2). There are three foundation elements that must be met before testimony is admitted under the excited-utterance exception: 1) there was a startling event; 2) the statement was related to that event; and 3) the declarant was under the stress of the startling event when she made the statement. "When a hearsay statement is offered under this exception, the trial court must make a preliminary factual determination that the declarant was so excited or distraught at the moment of the utterance that [she] did not reflect (or have an opportunity to reflect) on what [she] was saying." *United States v. McLennan*, 563 F.2d 943, 948 (9th Cir. 1977). An example of an inadmissible

1 excited utterance would be when the declarant made the statement after speaking to  
2 several people about the matter asserted. *United States v. Sherlock*, 962 F.2d 1349,  
3 1365 (9th Cir. 1989) (Hearsay statement made about an alleged rape occurred after the  
4 declarant spoke to several persons about being raped was inadmissible under excited-  
5 utterance exception).

6 The rationale of the excited-utterance exception is that the stress of nervous  
7 excitement or shock interferes with one's reflective faculties, making the statement less  
8 prone to fabrication. Therefore, when the circumstances indicate that the statement was  
9 made with some level of reflection, then the trial court should find that the excited-  
10 utterance exception does not apply. *United State v. DeMarce*, 564 F.3d 989, 997  
11 (8th Cir. 2009).

12 Unless and until the government can lay a proper foundation by meeting all three  
13 criteria listed above, the excited-utterance hearsay exception would not permit other  
14 witnesses to testify about C.E.'s out-of-court statements.

#### 15 **D. Prior Consistent Statements**

16 The government indicates it might introduce prior "consistent" statements made  
17 by the alleged victim about the alleged incident pursuant to FRE 801(d)(1)(B)(i) & (ii).  
18 Before admitting a prior consistent statement under the rule, the government must lay a  
19 proper foundation that "a charge of *recent* fabrication or improper influence" was made  
20 during cross examination. Alternatively, the foundation would require a need to  
21 "rehabilitate the [alleged victim's] credibility as a witness when attacked on another  
22 ground."

23 To be admissible, the "consistent statement" must have been made before the  
24 alleged improper influence or the attachment of the alleged motive to fabricate. *Tome v.*  
25 *United States*, 513 U.S. 150 (1995); *see also United States v. Awon*, 135 F.3d 96, 100  
26 (1st Cir. 1998) (improper to admit prior consistent statement of government witness

1 where the “motive to fabricate alleged by the defense—desire for leniency—was the  
2 same when the [witnesses] first spoke with police as at the time of their testimony at  
3 trial.”). Attacking the credibility of the complaining witness by asserting that her  
4 account of what happened is not true will not in itself justify the admission of a prior  
5 consistent statement. Rather, there must be a charge of “recent fabrication or improper  
6 influence” together with evidence that the prior “consistent” statement was made before  
7 the event that triggers the fabrication or improper influence. *See United States v.*  
8 *Portillo*, 969 F.3d 144, 174 (5th Cir. 2020) (prior consistent testimony is not admissible  
9 when the motive to fabricate existed at the time the prior consistent statement was  
10 given).

11 Additionally, subsection (ii) extends the rule to permit a prior consistent  
12 statement only to rehabilitate the declarant’s (or in this case, the alleged victim’s)  
13 credibility as a witness when attacked on another ground—such as charges of  
14 inconsistency or faulty memory. *See* Advisory Committee’s Note to 2014 Amendment.  
15 However, the government cannot attempt to bolster the trial testimony of E.C. by  
16 introducing “prior consistent statements” prior to impeachment. *See United States v.*  
17 *McCulley*, 178 F.3d 872, 876 (7th Cir. 1999) (prior consistent statement excluded  
18 because moving party “attempted to bolster impermissibly [defendant’s] trial testimony  
19 by the introduction of the statement in question”). If hypothetically the defense does not  
20 challenge the witness’s credibility pertaining to the facts, such as alleging faulty  
21 memory, then testimony under FRE 801(d)(1)(B) should be inadmissible. For example,  
22 if E.C. testifies that Mr. Baker touched her genitalia and inner thigh, and then  
23 Mr. Baker alleges on cross examination that E.C.’s memory is wrong, then prior  
24 consistent statements would be admissible. Otherwise, this Court should exclude  
25 testimony about prior consistent statements.  
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1 Finally, even if this Court determines that FRE 801(d)(1)(B) would allow prior  
2 consistent statements, this Court should still exclude the evidence under FRE 403. On  
3 balance, the prior consistent statements would be more prejudicial than probative  
4 primarily because the prior statements would be cumulative and unnecessarily  
5 repetitive assuming E.C. testifies that Mr. Baker touched the body parts alleged in the  
6 superseding indictment. In the end, the prior consistent statements would have the  
7 improper effect of bolstering the credibility of E.C. and therefore these statements  
8 should be excluded under FRE 403.

9 The government has also indicated that it may seek to introduce the prior  
10 recordings of the statements under FRE 801(d)(1)(B). In the event the Court permits  
11 testimony of prior consistent statements, the scope of such evidence should not extend  
12 to photographs, video, and audio. Instead, the prior consistent statements should only be  
13 admissible through a witness with first-hand knowledge of the out-of-court statement.  
14 To permit recordings of the statements would amount to double hearsay.

### 15 **III. JURY INSTRUCTIONS**

16 For the most part, the parties agree about the proposed jury instructions. The  
17 following instructions are in dispute:

#### 18 **1) Instructions 7, 8, & 9**

19 The defense proposes these instructions as “limiting instructions” in the event  
20 the government offers FRE 404(b) evidence. Additionally, the defense has modified  
21 Instruction 8 to use “Mr. Baker” instead of defendant and to remind the jury that they  
22 cannot convict Mr. Baker for acts that are not charged in the indictment.

23 Mr. Baker deserves to be addressed by his name. Doing so ensures that he will  
24 be treated with respect and dignity while at the same time making it clear to the jury  
25 that he is presumed innocent. While it is legally correct to label Mr. Baker as a  
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1 defendant, there is no prejudice or harm in addressing him as “Mr. Baker,” particularly  
 2 given that he is the only person charged in this case.

3 Next, reminding the jury in Instruction 8 that they cannot convict Mr. Baker for  
 4 anything other than what he is charged with in the indictment will help ensure that  
 5 Mr. Baker receives a fair trial. This is especially important in a case such as this where  
 6 the government will offer 20-year-old evidence of uncharged conduct that Mr. Baker  
 7 committed a separate sexual assault. There is no dispute that this evidence is prejudicial  
 8 to Mr. Baker since he is not on trial for the 2004 incident. Accordingly, an instruction  
 9 that simply reminds the jury that Mr. Baker is only on trial for the 2024 charged  
 10 incident will hopefully mitigate the prejudicial impact of this evidence from 2004.

11 Finally, Instruction 9 would be necessary in the event the government introduces  
 12 evidence of other crimes, wrongs, or acts under FRE 404(b). As the government  
 13 indicates, in the event they choose not to introduce this type of evidence then the  
 14 instruction would be removed.

## 15 **2) Instruction 10: Lesser Included Instruction of Simple Assault**

16 There is no dispute that simple assault is a lesser included offense of Abusive  
 17 Sexual Contact. Therefore, the Court should reserve ruling on the inclusion of this  
 18 instruction until both sides rest.

## 19 **3) Instructions 14 & 15: the “To-Convict” Instruction**

20 The defense presented arguments in its motion to dismiss that the government  
 21 bears the burden of proving mens rea with respect to each material element of the  
 22 charge. This would include the element requiring proof that the sexual contact was  
 23 without E.C.’s permission. This Court ruled against the defense, which of course would

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1 support the government's proposed instructions. Nevertheless, arguments in support of  
2 the defense's proposed instruction are preserved in its motion to dismiss at Dkt. 25.

3 DATED this 11th day of October 2024.

4 Respectfully submitted,

5 *s/ Jesse Cantor*

6 *s/ Colleen Fitzharris*

7 Assistant Federal Public Defenders

8 Attorneys for Justin Baker